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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-468

UNITED AIR LINES, INC.,

Petitioner,

vs.

MARY BURKE SPROGIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

H. TEMPLETON BROWN,
STUART BERNSTEIN,
ARTHUR J. KOWITT,
231 South LaSalle Street,
Chicago, Illinois 60604,
Counsel for Petitioner.

Of Counsel:
MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604.

THE GOTTSDIP-GRABER PRINTING COMPANY, CHICAGO

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I.

a. In an obvious attempt to change the facts of this case to fit those of *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971)—where females with pre-school age children were ineligible for employment but males were eligible for the same job without regard to age of their children—respondent now argues that the job classification under consideration here is not that of 4900 stewardesses but also includes the 116 male stewards used solely on overseas flights. "The actual employment of male stewards serving essentially the same functions as stewardesses

makes factually inaccurate United's contention that 'stewardess' is a unique occupational grouping." (Resp. Br. 11.)

But this is not the argument respondent made to the Court of Appeals; and the Court majority did not decide this case on the assumption that males and females occupied the same position. Further, if this new contention is now considered to be relevant by respondent, then additional disputed facts are raised which cannot be disposed of summarily against United.

We noted in our petition that counsel for respondent, in response to a question from the Court of Appeals during oral argument, replied that if female sex was a BFOQ for the position of stewardess, then the no-marriage rule would not violate the Act. (Pet. 15.) But that answer is completely inconsistent with the argument now raised that the classification included both males and females.

The majority of the Court decided the case on the assumption that stewardesses occupied a unique classification. The basis of its opinion in this area was not that males were employed in the same classification, but rather that the no-marriage rule was not applied to any male in United's employ, including male flight personnel. (Opinion, Pet. A16.) "Considerations of the peculiar characteristics of the position only pertain to the claim of a bona fide occupational qualification under Section 703(e)(1)." (Opinion, Pet. A17.) Although we consider this statement to be a misreading of the Act, it hardly suggests an acceptance of the argument that the position included males and females.

In any event, United's affidavits spelled out in detail the differences between the job of the male steward employed solely on Hawaii flights and charter flights for the United States Military Airlift Command and that of stewardess. The steward stows baggage, cleans the cabin,

lounges and lavatories of planes. On the Hawaiian operation, he must have spent a minimum of ten years as a resident of the Islands and have acquired an understanding of Hawaiian culture and tradition so that he can answer questions and volunteer information on the Islands. To add to this "color" he wears native Island dress. He does not displace a stewardess, but is additional personnel on these flights, and his presence does not affect the duties of the stewardess. He is never used on domestic flights. He is covered by separate collective bargaining agreement. He is carried in a separate classification, has a separate job description, and is under separate supervision. (App. 67-71, 72, 81.)

None of these facts were disputed by respondent. If respondent now contends the two jobs are really the same, that issue certainly cannot be resolved against United on summary judgment.

b. In attempting to state United's positon on the female sex BFOQ issue, respondent writes: "[United] argues that summary judgment on the issue of sex as a BFOQ was unjustified. Such an argument was rejected by both the majority and minority in the Court of Appeals and is in conflict with the Supreme Court holding in *Phillips.*" (Resp. Br. 12.)

The majority did not reject the argument; it simply avoided it. Knowing full well that the issue of sex as a BFOQ could not be decided on summary judgment since it clearly raised disputed issues of fact and required an evidentiary hearing under *Phillips,* the majority found "it unnecessary to consider the validity of United's claim that sex constitutes a bona fide occupational requirement for the job of airline stewardess." (Opinion, Pet. A17.)

Judge Stevens never reached the question of female sex as a BFOQ since he found there was no violation of

Section 703(a)(1) in the first instance; hence there was no necessity for reaching the BFOQ defense under Section 703(e). ". . . United did not violate § 703(a)(1) by discharging plaintiff from a position which she could not have retained if she had been a man." (Min. Opinion, Pet. A32.)

Once the majority rejected Judge Stevens' point, then the BFOQ issue had to be faced. The refusal of the majority to consider whether female sex was a BFOQ for the position of stewardess and the propriety of summary disposition of the question by the trial court, because it was "unnecessary" (Opinion, Pet. A17), is precisely what has created the confusion over the meaning of the Act described in the petition. (Pet. 12-16.)

Respondent now seeks to rectify this patent defect by trying to change the facts.

II.

In support of its argument that the General Counsel opinion upon which United claims reliance did not meet the requirements of Section 713(b), respondent cites *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F. 2d 980 (C. A. 5, 1969), cert. den. 397 U. S. 919 (1970). (Resp. Br. 15-16.)

There the Court noted that the letter upon which reliance was claimed was not written by the General Counsel of the Commission and was not designated as an opinion letter. 416 F. 2d at 997.

The letter relied upon by United *was* written by the General Counsel of the Commission and *was* designated as an "opinion."

The Court in *Local 189* noted that a broader reading of the Commission's regulation "might bind the Commission to *informal or unapproved* opinions volunteered by members of its staff." (416 F. 2d at 997, emphasis added.)

Here the Commission published the digest of the opinion on two occasions and stated in its own publication that it was "specifically adopted by the Commission." (Pet. 18.)

Local 189 is not very good authority for respondent's position.

United relied on a letter written by the General Counsel of the Commission, designated as an "opinion" and specifically adopted by the Commission. The Commission cannot abandon that document after such reliance by claiming it was only an "internal memorandum," or that it was designated as a "General Counsel Opinion," and not "General Counsel Opinion Letter," or by publishing an after-the-fact disclaimer in the Federal Register. (See Pet. 23, n. 7.)

III.

a. Respondent now suggests that it is premature for this Court to consider petitioner's contention that it would be improper to convert an individual claim into a class action after judgment. The Court of Appeals "merely allowed the court to proceed to hear arguments and evidence, 'including references to the safeguards of Rule 23 . . .'" (Resp. Br. 20.) Perhaps, argues respondent, the relief will be ultimately limited to Mrs. Sprogis, in which event the "issue will be mooted." And if not, then United can "again petition this Court for certiorari." (Resp. Br. 20-21.)

But the question is not whether United can raise arguments on remand and contest the propriety of class relief. The question is whether the issue is the same after judgment. The critical "safeguard" of Rule 23 is that the

determination of all questions of the propriety of the class action, and its composition if class action is appropriate, be made before judgment. For then the outcome is in doubt and risk of defeat and its attendant sharing of cost is on the putative class members. The considerations are not the same after judgment when the risk has been removed.

b. Title VII of the Civil Rights Act of 1964 imposes an obligation upon claimants to come forward within prescribed time limits. See section 706(d), (e). This requirement for each claimant may be waived, at least as to equitable relief, in an appropriate class action instituted by a representative who has satisfied the time limits and other jurisdictional requirements. But when the class representation is not asserted until after judgment, the passage of time is critical to a defendant who finds the number of claimants expanded far beyond his expectations based on a reading of the statute and Rule 23. A defendant is entitled to know before trial precisely the scope of potential liability.

The effect of the class inquiry after judgment is to toll retroactively the statutory period for non-litigants who may now come in risk free, but with respect to whom the statutory time limits had already run.

c. If the trial court is empowered to make the inquiry after judgment as to whether relief should be extended to others, it must have the power to grant such relief. But this is in direct conflict with *Danner* v. *Phillips Petroleum Co.*, 447 F. 2d 159 (C. A. 5, 1971), a case fully

discussed in the Petition, 26-27. Respondent makes no attempt to distinguish this case. In fact, it is not even mentioned in the Opposition Brief.

Respectfully submitted,

H. Templeton Brown,
Stuart Bernstein,
Arthur J. Kowitt,
231 South LaSalle Street,
Chicago, Illinois 60604,
Counsel for Petitioner.

Of Counsel:
Mayer, Brown & Platt,
231 South LaSalle Street,
Chicago, Illinois 60604.

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